NO. 85-1337

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IN THE

Supreme Court of the United States

OCTOBER TERM 1985

STATE OF NORTH CAROLINA,
Petitioner,

v.

WILLIAM HARBISON, JR.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

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QUESTION PRESENTED

WHETHER A TACTICAL DECISION MADE BY COUNSEL FOR A CRIMINAL DEFENDANT TO ADMIT, DURING JURY ARGUMENT, HIS CLIENTS GUILT OF A LESSER-INCLUDED OFFENSE BUT SEEK ACQUITTAL OF THE OFFENSE CHARGED, CONSTITUTES A *PER SE* VIOLATION OF THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL?

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PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The State of North Carolina prays that a Writ of Certiorari issue to review the judgment of the North Carolina Supreme Court, entered on December 10, 1985, which reversed Respondent Harbison's convictions and granted him a new trial.[1]

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[1] The parties to this proceeding are the Petitioner, State of North Carolina, hereinafter referred to as "State," and Respondent, William Harbison, Jr., hereinafter referred to as "Harbison."

OPINIONS BELOW

The Opinion of the Supreme Court of North Carolina is published at _____ N.C. _____, 337 S.E.2d 504 (1985). A copy is included in the Appendix to this Petition. (Appendix A at A-1.)

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on December 10, 1985. The jurisdiction of this court to review that judgment is invoked pursuant to 28 U.S.C. §1257 and Rule 17.1(b) and (c) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth and Fourteenth Amendments to the United States Constitution.

U.S. Const. Amend. VI provides:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. Amend. XIV, §1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

> citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent William Harbison, Jr. was indicted in June 1976 for the first-degree murder of Morris Garfield Hardy and for assault with a deadly weapon, with intent to kill, inflicting serious bodily injury upon Dannah Yvonne Franklin. (Appendix B at A-8.)

The trial was held at the August 30, 1976 Criminal Session of Burke County Superior Court. Harbison was represented by Mr. John McMurray, appointed from the local bar, and Mr. James Fuller of Charlotte, North Carolina, who had been retained by Harbison's family just prior to the trial date.[2]

In brief, the State's evidence showed that Harbison was Dannah Franklin's boyfriend. On the night of April 24, 1976 Ms. Franklin was driving her car with Morris Hardy sitting in the front passenger seat. Harbison spotted them, pursued Ms. Franklin's vehicle for several miles, and finally succeeded in pulling his car in front of hers on a side road. Harbison jumped out of his car, gun in hand, and pointed the gun at the window. As Ms. Franklin attempted to drive around Harbison he fired two shots at the left front tire. It is undisputed that Harbison then fired

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[2] The Superior Court denied Harbison's motion for postponement. Mr. McMurray therefore remained in the case as co-counsel. (Appendix J at A-50.)

three shots through the window of the left front door at extremely close range. Ms. Franklin was hit in the side of her head. The shot that killed Morris Hardy, who was sitting in the right front passenger's seat, entered Hardy's back and travelled forward lodging in his right breast. Harbison's proffered explanation for these three shots was that he fired in a panic. However, the evidence showed he was a trained law enforcement officer with military experience and that his pistol had an abnormally heavy trigger pull.

Harbison testified that after the shooting he left the scene, but then came back. After finding Ms. Franklin wounded, but alive, he checked Hardy. Hardy was bleeding and moaning. Nevertheless, Harbison left him and took Ms. Franklin to the hospital. While en route he said that he did not mean to do it. He pleaded with Ms. Franklin not to tell anyone he had done it. He said, "Don't tell my daddy. Tell him someone else did it, I got too much going for me. Don't tell them I did it." Later he said that he had to "get rid of the gun." He threw the five spent shell casings out of the car on Interstate Highway 40. When he arrived at the hospital he hid the gun in some bushes. Upon questioning by police he initially denied any involvement in the shooting. However, he subsequently changed his statement explaining that he had needed time to "get his head straight."

Harbison contended that he acted in self-defense and had fired the shots only in an attempt to stop the car. Although Harbison attempted to introduce the left front tire of Ms. Franklin's car in order to corroborate his testimony, the trial court refused to admit it for failure to establish the proper chain of custody.

Both Mr. Fuller and Mr. McMurray made closing arguments for Harbison. However, no transcript of those arguments was made.

After deliberating for several hours the jury returned its verdicts finding Harbison guilty of *second-degree* murder and assault with a deadly weapon inflicting serious bodily injury.

On September 4, 1976 the trial judge sentenced Harbison to a term of life imprisonment on the second degree murder conviction and to a term of ten year's imprisonment on the assault conviction. (Appendix C at A-11 and D at A-12.)

Harbison appealed to the North Carolina Supreme Court. He did not raise the issue of effective assistance of counsel in that appeal. He continued to be represented by Mr. McMurray and Mr. Fuller. On November 11, 1977 the North Carolina Supreme Court rendered its decision affirming the convictions, finding no error in Harbison's trial. *State* v. *Harbison*, 293 N.C. 474, 238 S.E.2d 449 (1977). (Appendix E at A-13.)

Thereafter, Harbison sought relief in the United States District Court for the Western District of North Carolina by way of a petition for a writ of habeas corpus. He again failed to raise the effective assistance of counsel claim. On December 9, 1983 the District Court entered its order denying the petition. *Harbison* v. *North Carolina*, No. A-C-83-225 (W.D.N.C. Dec. 9, 1983). Appendix F at A-27.)

On May 3, 1984, seven years and seven months following the convictions, Harbison filed a Motion for Appropriate Relief pursuant to N.C.G.S. §15A-1411[3] and N.C.G.S. §15A-1415[4] alleging, for the first time, that he was denied effective assistance of counsel at his trial. (Appendix G at A-42.) In that motion Harbison alleged that his court-appointed attorney, Mr. John McMurray, made the following statement during closing arguments:

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[3] *See* Appendix H at A-47.

[4] *See* Appendix I at A-48.

> Ladies and gentlemen of the jury, I know some of you and have had dealings with some of you. I know that you want to leave here with a clear conscious [sic]. I have my opinion as to what happened on that April night, and I don't feel that William should be found innocent. I think he should do some time to think about what he has done. I think you should find him guilty of manslaughter and not first degree.

(Appendix G at A-44-45.)

Since no transcript of the actual argument was made, it was Harbison's memory which formed the basis for his motion, together with a statement from his other trial counsel, Mr. James Fuller, which had been given in response to Harbison's interrogatories. The interrogatories requested Mr. Fuller's opinion as to whether Mr. McMurray had offered Harbison effective assistance of counsel. Mr. Fuller replied,

> This question is impossible to answer directly because it calls for factual and legal conclusions. In past conversations with Mr. Harbison, he has expressed concern about two primary areas. In hopes of answering the spirit of this question, I will address those two areas.
>
> First, as trial approached, it became apparent that there had not been a physical inspection of the shooting site or a physical inspection of the death vehicle's damaged tire that would later be the subject of several appeals. With our investigator Les Burns, I checked both. I never discussed the question with Mr. McMurray and, therefore, have no idea about his reason for not conducting the inspections or whether he thought such was unnecessary.

> In my opinion, the tire offered the only evidence supporting a defense that could lead to acquittal. The scene was less important since there were numerous sketches and photos.
>
> The second question arose during closing argument. Going first for the defense, I argued for acquittal based on our theory of self-defense, suggesting that the car had sped at Mr. Harbison, that he had fired first to stop the speeding vehicle, and that the last several rounds were fired in a panic as the car sped past. While the argument is theoretically sound, and supported by the holes in the tire, it would be a difficult argument to sale [sic] to the jury under any conditions. Mr. McMurray followed. During his argument, I was quite surprised to hear him suggest to the jury that Mr. Harbison should be convicted of manslaughter. He asked the jury to choose between two "extreme views," that advanced by me and by the District Attorney. During his argument Mr. Harbison became visibly upset. He asked the investigator and me several times in whispered tones if Mr. McMurray was on his side or the State's. Later, I indirectly expressed my surprise to Mr. McMurray. He responded that he knew personally a number of the jurors and believed there was no reasonable possibility of their returning a verdict of acquittal. Therefore, he tried to give them a middle ground that would be less painful to Mr. Harbison than a conviction for murder. To my knowledge, Mr. Harbison never consented to such an argument.

(Appendix J at A-50-51.)

Superior Court Judge Claude S. Sitton considered the motion, but he did not hold an evidentiary hearing. In an

Order entered on June 12, 1984, Judge Sitton denied the motion, stating:

> This Court finds and concludes as a matter of law that the Defendant has not been deprived of proper legal representation. The Appellate Courts have previously held that the standard of effective representation of counsel is not the same as errorless representation. The fact that the defense may not have been the best is not within itself grounds for relief.
>
> This Court further finds that the personal comments and opinions expressed by counsel were not proper, but further finds that the statements were not and do not constitute prejudicial error.

(Appendix K at A-54.)

Defendant then filed a Petition for Writ of Certiorari in the North Carolina Supreme Court. On November 6, 1984 that Court granted the Petition, with review limited "to whether trial counsel's argument to the jury constituted prejudicial error." (Appendix L at A-56.)

During the pendency of the appeal, the North Carolina State Bar held a disciplinary proceeding against Mr. John McMurray upon a complaint filed by Harbison. Testimony was taken from Harbison, Mr. Fuller, Mr. McMurray, the trial judge and the jury foreman. The evidence was conflicting as to the actual argument made by Mr. McMurray. Mr. McMurray testified that he knew several of the jurors and became convinced that the self-defense plea would not be accepted. He then testified that:

> I concluded that you had to say something to the

> jury in some way to get them to consider a lesser included offense. I didn't argue that he was convicted — that he should be convicted of anything. The import comes through that way. My argument — the thrust of my argument was that he should not be convicted of felony murder or first degree murder or second degree murder.

(Appendix M at A-78.)

He also testified that:

> [A]t some point in the argument I said, You're going to find him guilty — or you may find him guilty of some criminal offense. I cannot quote my words precisely. You may find him guilty of some criminal offense; you will find him guilty of some criminal offense, but you should not find him guilty of any offense greater than manslaughter.

(Appendix M at A-80.)

Mr. McMurray specifically denied making the statement attributed to him by Harbison. (Appendix M at A-94-95.) The jury foreman testified that Mr. McMurray's argument persuaded him to vote for second-degree rather than first-degree murder as he originally intended. (Appendix N at A-115-116.)

Several experienced attorneys and trial judges, including the late Senator Sam Ervin and the Attorney General of North Carolina, testified as expert witnesses for Mr. McMurray, stating their opinions that Mr. McMurray's argument was a valid trial tactic.

After hearing the evidence, the State Bar dismissed the

case on the basis that it was unable to determine what argument had actually been made. (Appendix O at A-119.)

The State subsequently filed a motion in Harbison's appeal asking the North Carolina Supreme Court to remand the case to the Superior Court for an evidentiary hearing, or in the alternative, to accept the record of the State Bar proceedings in diminution of the record on appeal. (Appendix O at 123.) However, the court denied that motion. (Appendix Q.)

After reviewing briefs from Harbison and the State and after hearing oral arguments, the North Carolina Supreme Court entered its opinion holding that Harbison was denied the effective assistance of counsel guaranteed by the Sixth Amendment. Specifically, the court held that Counsel's argument constituted a *per se* violation of the Sixth Amendment without the need for any showing of prejudice. (Appendix A at A-6.)

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NORTH CAROLINA SUPREME COURT HOLDING THAT COUNSEL'S JURY ARGUMENT CONSTITUTED A *PER SE* VIOLATION OF HARBISON'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, WITHOUT INQUIRING WHETHER HARBISON WAS PREJUDICED, IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT IN *STRICKLAND* V. *WASHINGTON*, 466 U.S. 668 (1984), AND *UNITED STATES* V. *CRONIC* 466 U.S. 648 (1984).

This Court's review of the decision of the North Carolina Supreme Court is warranted first and foremost because that decision is in significant conflict with two recent

landmark Sixth Amendment cases decided by this Court.

In the companion cases of *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *United States* v. *Cronic*, 466 U.S. 648 (1984), this Court expressly distinguished between the standards of appellate review to be applied under the Sixth Amendment to cases involving the "actual or constructive denial of the assistance of counsel" and those involving "actual ineffectiveness" claims alleging a deficiency in attorney performance. *Strickland*, 446 U.S. at _____, 104 S.Ct. at 2067. Prejudice may be presumed in the former category, but must be established by defendant in the latter. *Id.* Here, the surrounding circumstances of Mr. McMurray's mitigating argument to the jury about Harbison's guilt of a lesser included offense simply do not justify a presumption of ineffectiveness. *Cronic*, 466 U.S. at _____, 104 S.Ct. at 2048. Therefore, the North Carolina Supreme Court should have evaluated the alleged error by Mr. McMurray under the *Strickland* standard rather than finding a *per se* Sixth Amendment violation.

The opinions in *Strickland* and *Cronic* recognized that there are significant policy considerations mandating the application of different standards of review for the two types of cases. The "actual or constructive denial" cases include those where a defendant has been denied the assistance of counsel at a critical stage of the criminal proceedings[5] or where the State affirmatively interferes with the representation process.[6] As this Court explained:

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[5] *E.g.*, *Geders* v. *United States*, 425 U.S. 80 (1975) (counsel not allowed to consult with defendant during overnight recess); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961) (denial of counsel at arraignment); *William* v. *Kiser*, 323 U.S. 471 (1945) (denial of counsel at trial).

[6] *E.g.*, *Davis* v. *Alaska*, 415 U.S. 308 (1974) (counsel prohibited from cross-examining prosecution witness about juvenile criminal record); *Brooks* v. *Tennessee*, 406 U.S. 605 (1972) (state statute required defendant to testify as his first witness).

> prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost. [*United States* v. *Cronic*, 466 U.S. at ——, 104 S.Ct. at 2047]. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.

Strickland, 466 U.S. at ——, 104 S.Ct. at 2067.[7]

However, apart from circumstances of the magnitude identified above, this Court has noted there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt. *Cronic*, 466 U.S. at ——, 104 S.Ct. at 2046. In *Strickland* and *Cronic* this Court expressly refused to extend the presumption of prejudice to cases involving allegations of attorney error in the so-called "actual ineffectiveness" cases. In such cases, the government is not responsible for, and hence not able to prevent, attorney errors that may result in reversal of a conviction or sentence. *Strickland*, 466 U.S. at ——, 104 S.Ct. at 2067. Since a presumption of prejudice would not serve to deter the State from any unconstitutional course of action, the sole effect of the presumption would be to "bestow a windfall upon criminal defendants who were not harmed by the errors of their

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[7]One other type of case has been accorded a more limited presumption of prejudice, *i.e.*, those involving counsel burdened by an actual conflict of interest. *See Cuyler* v. *Sullivan*, 446 U.S. 335 (1980). As Justice O'Conner pointed out in *Strickland*, the difficulty of measuring the effect on defense counsel's representation in such cases together with the ability of the trial courts to make early inquiry in situations likely to give rise to conflicts, make it reasonable to impose a more rigid rule in such cases. However, even here, prejudice is only presumed if the defendant shows that there was an actual conflict *and* that the conflict adversely affected the lawyer's performance.

attorneys." *Washington* v. *Strickland*, 693 F.2d 1243, 1260 (5th Cir. 1982).

The requirement mandated by *Strickland* and *Cronic* that a defendant show not only attorney error but also prejudice negates the possibility of such a windfall. More importantly, it serves to ensure that the purpose underlying the Sixth Amendment's requirement of assistance of counsel, *i.e.*, a fair trial, is preserved by allowing the reviewing court to assess the surrounding circumstances and determine:

> whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

Strickland, 466 U.S. at ——, 104 S.Ct. at 2064.

In the case at bar trial counsel's decision to argue for a lesser-included offense was based on his assessment of the jury's reaction to Harbison's self-defense theory. counsel had put the State's proof to the test in an adversarial context. However, the evidence was overwhelming and, as the North Carolina Supreme Court stated in its first opinion (Appendix E at A-27), would have supported conviction of murder in the first degree. Even Mr. Fuller, Harbison's retained co-counsel, admitted that his self-defense theory and argument were not likely to convince the jury "under any conditions." (Appendix J at A-51). The one piece of evidence which could have supported the self-defense theory (the tire) had not been admitted into evidence. It was only in the light of these facts that Mr. McMurray made an informed tactical decision to argue for manslaughter. However, by refusing to consider the circumstances surrounding that decision and by holding that Harbison need not show prejudice, the North Carolina Supreme Court ignored this Court's observation in

Strickland that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," *Strickland*, 466 U.S. at ——, 104 S.Ct. at 2066, and failed to require that Harbison overcome the "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional competence." *Id.*[8]

The North Carolina Supreme Court's presumption of prejudice is premised solely on the assumption that an attorney's jury argument admitting his client's guilt without first obtaining the client's consent is the functional equivalent of a guilty plea entered without the client's consent. (Appendix A at A-6). However, as this Court noted in *Boykin* v. *Alabama*, 395 U.S. 238 (1969):

> A plea of guilty is more than a voluntary confession made in open court. It also serves as a stipulation that no proof by the prosecution need be advanced.

Id. at 242 n.4. Unlike a guilty plea, here the State's case was put to the test in an adversarial context, and only thereafter did counsel make the calculated tactical decision to argue for conviction of a lesser offense than the crime

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[8] Many courts, state and federal, have recognized the validity of this tactic in the face of overwhelming evidence. *See, e.g., United States* v. *Liefried*, 732 F.2d 388 (4th Cir. 1984); *McNeal* v. *Wainwright*, 722 F.2d 674 (11th Cir. 1984); *United States* v. *Trapnell*, 638 F.2d 1016 (7th Cir. 1980); *People* v. *Wise*, 351 N.W.2d 255 (Mich. App. 1984); *Commonwealth* v. *Stoute*, 413 N.E.2d 739 (Mass. App. 1980); *Meadows* v. *Commonwealth*, 550 S.W.2d 511 (Ky. 1977); *People* v. *Gary*, 49 Ill.App.3d 704, 364 N.E.2d 726 (1977).

These cases have distinguished the holding of cases like *Wiley* v. *Sowders*, 647 F.2d 642 (6th Cir.), *cert. denied*, 454 U.S. 1091 (1981), *and People* v. *Carter*, 41 Ill.App.3d 425, 354 N.E.2d 482 (1976), relied on by the North Carolina Supreme Court, where counsel admitted guilt to the maximum offense charged, thereby completely failing to preserve the adversarial process.

charged. "The action of trial counsel ... may have amounted to a tactical retreat, but certainly it did not surrender the cause." *Meadows* v. *Commonwealth*, 550 S.W.2d 511, 512 (Ky. 1977). Despite Mr. McMurray's mitigating argument, the jury still was required to put the State to its burden of proving Harbison guilty of any crime. Moreover, Mr. McMurray and Mr. Fuller were effective adversaries of the State's case. Therefore, the North Carolina Supreme Court's fallible premise that the argument "swept away" Harbison's right to "a fair trial and to put the State to its burden of proof" does not constitute a "surrounding circumstance" justifying a presumption of ineffectiveness.

Further, the North Carolina Supreme Court not only failed to apply the standards of review mandated by this Court, but it also carved out a new category to be added to the list involving a *per se* violation of the Sixth Amendment. In so doing it has blurred the distinctions so carefully drawn by this Court on the basis of sound policy considerations.

If the North Carolina Supreme Court's decision remains uncorrected any attorney error may now be fair game for inclusion in the limited category of *per se* violations as the lower courts use the Sixth Amendment to second-guess, on a case by case basis, those tactical decisions of defense counsel which appear unwise, regardless of whether the defendant was actually prejudiced. Such a situation creates an intolerable burden for the trial courts and the State since defense counsel are in sole control of the creation or prevention of such errors. The requirement that actual prejudice be shown is the only effective way to ensure that both the defendant and the State receive a fair trial.

II. THE NORTH CAROLINA SUPREME COURT'S DECISION ALSO IS IN CONFLICT WITH OTHER DECISIONS OF THE STATE AND FEDERAL COURTS WHICH HAVE NOT APPLIED THE PRESUMPTION OF PREJUDICE UNDER SUCH CIRCUMSTANCES.

The North Carolina Supreme Court's decision also is in conflict with a number of federal and state court decisions, in particular *McNeal* v. *Wainwright*, 722 F.2d 674 (11th Cir. 1984).

In *McNeal*, defense counsel made a closing argument, similar to the one at issue herein, which suggested that defendant McNeal was guilty of manslaughter and not first-degree murder. McNeal contended that he was denied the effective assistance of counsel because this argument amounted to an admission of guilt by counsel, without his prior knowledge or consent. On appeal of the federal district court's refusal to grant habeas corpus relief, the United States Court of Appeals for the Eleventh Circuit held that defense counsel's arguments to the jury concerning manslaughter "were tactical and strategic," and thus "the strategy of the trial counsel was proper and would not amount to a constitutional violation." *Id.* at 676. The Eleventh Circuit panel also rejected McNeal's argument that defense counsel's statements amounted to a guilty plea entered without consent, distinguishing *Wiley* v. *Sowders*, 647 F.2d 642 (6th Cir.), *cert. denied*, 454 U.S. 1091 (1981), as a case in which the defense counsel repeatedly stated his clients were guilty of the offenses charged rather than a lesser offense. *Id.* at 676-77. The Eleventh Circuit observed that "[a]n attorney's strategy may bind his client even when made without consultation." *Id.* at 677. It also cited with approval the Florida Supreme Court's commentary:

> When faced with the duty of attempting to avoid the consequences of overwhelming evidence of

> the commission of an atrocious crime, such as a deliberate, considered killing without the remotest legal justification or excuse, it is commonly considered a good trial strategy for a defense counsel to make some halfway concessions to the truth in order to give the appearance of reasonableness and candor and to thereby gain credibility and jury acceptance of some more important position. To be effectual, trial counsel should be able to do this *without express approval of his client* and without risk of being branded as being professionally ineffective because others may have different judgment or less experience.

McNeal v. *State*, 409 S.E.2d 528, 529 (Fla. Dist. Ct. App. 1982) (emphasis added; citations and footnote omitted).

Here, although Mr. McMurray made an argument similar to the "at best" argument in *McNeal*, the North Carolina Supreme Court held he had admitted his client's guilt without first obtaining consent and, therefore, there was a *per se* violation of the Sixth Amendment without any need for inquiry as to whether Harbison had been prejudiced by the remarks. These holdings are in direct and significant conflict with each other on an important question of federal law, and this conflict should be settled by this Court.

Likewise, the North Carolina Supreme Court's decision is even in conflict with decisions of other federal and state courts that have found constitutional violations in similar instances of defense counsel's jury arguments. All of these cases, either expressly or implicitly, analyze whether the defendants were prejudiced by the arguments, rather than presuming prejudice as the North Carolina Supreme Court did in its decision. *Cf., e.g., King* v. *Strickland*, 748 F.2d 1462 (11th Cir. 1984), *cert. denied*, _____ U.S. _____,

105 S.Ct. 2020 (1985); *Francis* v. *Spraggins*, 720 F.2d 1190 (11th Cir. 1983), *cert denied*, _____ U.S. _____, 105 S.Ct. 1776 (1985); *Young* v. *Zant*, 667 F.2d 792 (11th Cir. 1982); *Wiley* v. *Sowders, supra; Commonwealth* v. *Lane*, 476 Pa. 258, 382 A.2d 460 (1978). In fact, the North Carolina Supreme Court's decision apparently is the first to hold that such an argument is a *per se* violation of the Sixth Amendment right to effective assistance of counsel. Again, review by this Court is warranted to resolve this conflict as to the proper analysis for such asserted errors in defense counsel's jury argument.

CONCLUSION

The North Carolina Supreme Court's decision is a dangerous and unprecedented pronouncement on an important issue of federal constitutional law which this Court should and, ultimately, must settle. Indeed, the state court announced the rule that under the Sixth Amendment to the United States Constitution, it is *per se* ineffective assistance of counsel "in *every* criminal case" in which defense counsel admits the defendant's guilt to the jury without the defendant's consent. The court reasoned that in such cases "the harm is so likely and so apparent that the issue of prejudice need not be addressed." (Appendix A at A-5.)

This case *squarely* presents the issue whether such a presumption of prejudice is justified without inquiry into counsel's actual performance at trial. The issue is relatively straightforward — whether a tactical decision by an attorney to argue to the jury that his client is guilty of only a lesser included offense constitutes a *per se* violation of the Sixth Amendment, or whether the defendant must affirmatively prove prejudice to make out such a violation. Resolution of this issue is needed inasmuch as this tactic by defense attorneys is commonplace in the trial of criminal cases, and this decision, if undisturbed, may give rise to numerous other *per se* ineffectiveness challenges

even though counsel's action clearly inured to the benefit of his client. It is also important to resolve this issue so that defense attorneys will not be tempted to "sandbag" a case with error when it appears conviction is likely. In such cases, the State stands virtually helpless to prevent the interjection of the error into the trial. Under the North Carolina Supreme Court's decision, a defense attorney need only make reference in his jury argument to his client's guilt of a lesser included offense, and his client will be awarded a new trial on appeal. Our system of justice cannot tolerate such an undermining of the finality of criminal trials.

Because the North Carolina Supreme Court's decision on this important and recurring issue of federal law is in conflict with the recent decisions of this Court, with the decisions of the federal circuit courts of appeal which have ruled on the issue, and with a substantial number of state appellate courts, the State respectfully prays that a Writ of Certiorari should issue to review the judgment of the North Carolina Supreme Court herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an Assistant Attorney General for the State of North Carolina, and that I have served copies of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT by depositing same in the United States mail at Raleigh, North Carolina, first class postage prepaid, to:

Mr. Louis D. Bilinois
Box 1070
Raleigh, North Carolina 27602

This the 8th day of February, 1986.

Barry S. McNeill
Assistant Attorney General
Attorney for Petitioner